

Supreme Court U.S.
FILED
DEC 12 1989
JOSEPH P. SPANGLER, JR.
CLERK

No. 89-798

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

A. L. LOCKHART, Director
Arkansas Department of Correction,
Petitioner,

v.

T. J. HAYES,
Respondent,

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER REPEATED, IRRELEVANT AND INFLAMMATORY REFERENCES TO THE VICTIMS IN A CAPITAL MURDER PROSECUTION VIOLATED THE RULE OF BOOTH V. MARYLAND AND SOUTH CAROLINA V. GATHERS, OR WHETHER THE PROSECUTING ATTORNEY SHOULD BE PERMITTED TO SAY WHATEVER HE WANTS ABOUT THE VICTIMS, NO MATTER HOW IRRELEVANT THE REMARKS ARE TO THE OPERATIVE ISSUES IN THE TRIAL?

This issue was brought up in Hayes' petition for writ of certiorari (Hayes v. Lockhart, 88-6725) and the 6-4 judgment of the Eighth Circuit was reversed and remanded for reconsideration in light of South Carolina v. Gathers. On remand a unanimous panel of the Eighth Circuit held that Gathers applied and ordered a resentencing.

II.

IS SOUTH CAROLINA V. GATHERS RESTRICTED TO PENALTY PHASE ARGUMENT, WHEN SOME OF THE IMPROPER ARGUMENTS OCCURRED IN THE GUILT PHASE, OTHERS IN PENALTY, IN A SITUATION WHERE BOTH ARGUMENTS OCCURRED THE SAME DAY, BEFORE THE SAME JURY AND WITH NO RELEVANT ADDITIONAL EVIDENCE PRESENTED.

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THE OPINION OF THE EIGHTH CIRCUIT ON REMAND IS A
STRAIGHTFORWARD APPLICATION OF APPLICABLE
PRECEDENTS OF THIS COURT.

NEITHER THE OPINION OF THE COURT OF APPEALS NOR
SOUTH CAROLINA V. GATHERS CREATE CONFUSION ON
THE APPLICATION OF DARDEN V. WAINWRIGHT.

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The Respondent, T. J. Hayes, hereby opposes the grant of a writ of certiorari to the Petitioner, A. L. Lockhart, to review the judgment of the United States Court of Appeals for the Eighth Circuit.

However, Respondent also seeks the granting of a writ of certiorari on a cross-petition. The issues in that Petition are those presented in his Petition for Writ of Certiorari and not acted upon in this Court's ruling of June 19, 1989, remanding the matter to the Court of Appeals for reconsideration in light of Gathers.

OPINIONS BELOW

Lockhart's recapitulation of the previous opinions in this matter is somewhat incomplete. After denial by a divided panel in Hayes v. Lockhart, 852 F.2d 339 (8th Cir., 1988) Hayes sought rehearing en banc, which was denied by a vote of six to four of the active judges in the Circuit. Hayes v. Lockhart, 869 F.2d. 358 (1989) The rehearing opinions are appended hereto as Appendix A. Hayes then sought a petition for writ of certiorari in Hayes v. Lockhart, 88-6725, which was granted on June 19, 1989.

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South Carolina v. Gathers, 109 S.Ct. 2207	8
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment:

No person shall be..deprived of life, liberty or property without due process of law.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

Eighth Amendment:

...nor cruel and unusual punishments inflicted

Fourteenth Amendment:

...nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

STATUTES AND RULES

28 U.S.C. 1254	6
Ark. Stat. Ann. 41-1302	21
Ark. Stat. Ann. 41-1304	22
Ark. Stat. Ann. 41-1501	6
Rule 26.4, Arkansas Rules of Criminal Procedure	32

Note: In 1987 Arkansas renumbered its statutes into an "Arkansas Code." However, for purposes of clarity, the old designations are used.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1254.

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case, but adds the following:

On retrial after the reversal of his first trial, Hayes v. State, 274 Ark. 440, 623 S.W.2d 498 (1981), Hayes was appointed new counsel. Just before the trial was to begin, Hayes tried to enter a plea of guilty pursuant to a previously negotiated plea. The State had agree for him to receive the sentence of life imprisonment without parole; one cannot be sentenced to death in Arkansas after a guilty plea. Hayes, however, was not able to make the statements deemed necessary by the trial court in order to enter a guilty plea and thus proceeded to trial. At this trial, he was again convicted and sentenced to death. This conviction and sentence were upheld on appeal. Hayes v. State, 278 Ark. 211, 645 S.W.2d 662 (1983). Certiorari to the United States Supreme Court was sought but denied. 464 U.S. 865 (1983). He sought state post conviction relief, which was also denied. Hayes v. State, 280 Ark. 509, 660 S.W.2d 648 (1983), cert den. 465 U.S. 1051 (1984).

REASONS FOR NOT GRANTING THE WRIT

I.

THE OPINION OF THE EIGHTH CIRCUIT ON REMAND IS A STRAIGHTFORWARD APPLICATION OF APPLICABLE PRECEDENTS OF THIS COURT.

In Booth v. Maryland, 482 U.S. 496 (1987) the Court held that the admission of a victim impact statement in a death penalty prosecution was a violation of the Eighth Amendment because it increased the risk of an arbitrary and capricious sentence of death. In South Carolina v. Gathers, 109 S.Ct. 2207 (1989) the Court applied Booth to prosecutorial argument, making it clear that the spirit of Booth went beyond merely a sheet of paper called a "Victim Impact Statement."

Lockhart's first question presented in his petition is essentially a request to overrule Booth and Gathers. But certainly stare decisis requires adherence to those precedents. Just as certainly, the Court of Appeals' result in this case on remand was compelled by Booth and Gathers. Any distinctions are distinctions without a difference, as Judge Wollman noted in the panel opinion of August 16, 1989 (Lockhart's Exhibit A).

The criteria announced in Rule 17 of the Rules of the Supreme Court clearly evince that this is not a matter which fits within the guidelines for the granting of certiorari.

The remarks that the prosecutor made in this case, besides those quoted by Lockhart, include the following:

Their voices won't be heard with the exception of the fact that Mr. Robinson and I will be presenting our case and

hopefully their voices will be heard through our witnesses, but in the final analysis you will be their voices. (Trial Tr. 198)

He also said:

There is just one other point that I want to bring up. A lot of times in the summer time there is an awfully pretty sunset, awfully pretty. These two people never saw it, they never saw it and never will. (Trial Tr. 203)

In closing argument in the guilt phase the prosecutor described the victims as:

Catherine Carter, who spent three years at the Pine Bluff Nursing Home, helping people, caring about people, loving, supporting them and she gets a better job and she moves up to help her mother and her father and her fourteen year old son who is going to graduate from high school and he doesn't have a mother now and hasn't had in two and a half years, almost three years". (Trial Tr. 457)

This was Mr. Lunsford's first day on the job. Brand new. First day on the job trying to support his family, and it ends so abruptly and horribly for him. First day on the job and look what happens.

He also in the guilt phase closing violated the strictures against Golden Rule argument:

Put yourself in her shoes. Think about it when you get in the jury room. Think about it Mrs. Scott, you've got four children. Mrs. Curry, (the victim's mother) she only has four children. Her baby daughter is gone. Think about it Mrs. Burns when you get back in the jury room of the pain that she must have felt and the agony and the terror and the horror because she's got blood over her, she's partially clothed, all of her clothing comes off. She's humiliated standing in front of this man that she thought cared about her and she probably cared about and she's bleeding all over the place. (Trial Tr. 480)

In the penalty phase, after counsel had asked for mercy as a consideration for rendering a life without

parole sentence, the prosecutor made the following remarks:

Justice from my point of view, Mr. Robinson's point of view, these peoples point of view out there, your point of view, and I guess God's point of view because he told us in the Twentieth Chapter and Twenty-First Chapter of Exodus, thou shall not murder and the penalty for murder, I believe I wrote it down in verse Twelve of the Twenty-First Chapter, he that strikes a man and he dies shall surely be put to death. He also said if a man acts presumptuously toward his neighbor so as to kill him craftily you are to take him from my altar so that he may die. We are not seeking vengeance here, we are seeking justice and the State believes the evidence shows the defendant deserves the death penalty. (Trial Tr. 521-522)

Judge Bright, in his dissent, characterized these remarks as "patently improper." 852 F.2d at 356. He noted that "(s)uch selective quoting from the Old Testament is not only incendiary, but misleading."

When this case was decided by the Eighth Circuit in 1988, the panel majority declined to extend Booth beyond the specific formulation of a victim impact statement. Hayes and Gathers then brought their claims that the spirit of Booth mandated its application to argument as well; by fortuity, the matter was decided in Gathers and applied in Hayes instead of vice versa.

It is also difficult to understand how Lockhart can argue that the prosecutor's remarks fit within his proposed Booth exception of the circumstances of the crime. Hayes is unable to conceive how beautiful sunsets, children's high school graduations and Old Testament theology fit within the circumstance of the crime. If they do, then Booth and Gathers are meaningless.

Lockhart's claim that certain of the remarks were not challenged on appeal is somewhat disingenuous; Hayes quoted a number of passages as examples; the absence of a specific direct quotation from the argument, when a matter is included in the record, is not a waiver.

II.

NEITHER THE OPINION OF THE COURT OF APPEALS NOR SOUTH CAROLINA V. GATHERS CREATE CONFUSION ON THE APPLICATION OF DARDEN V. WAINWRIGHT.

There is no confusion about the application of Booth, Gathers, and Darden v. Wainwright, 477 U.S. 168 (1986). Darden announced a due process standard in evaluating argument. The five person majority of the Court, speaking through Justice Powell, noted that the argument "deserved the condemnation of every court that had reviewed it" but held that there was not a due process violation because of a number of reasons, including the fact that the arguments were responsive to defense arguments at that time. The guilt phase arguments here were not invited; the fact is that the improper argument started in opening statements.

Booth, which was decided after Darden, prohibited victim impact evidence because "its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." This is a phraseology not really different from the Darden due process "infection" test. Gathers is an application of Booth. The Booth-Gathers argument is thus among the improperly infectious argument that Darden proscribes, however backhandedly.

This Court has held in Turner v. Murray, 476 U.S. 28 (1986) that guilt phase error may have improper effect on

sentencing. That is particularly true in this case for reasons including the following:

(i) That the penalty phase immediately followed the guilt phase, on the same day, before the same jury, with no additional relevant evidence presented. (A prior conviction was introduced). The error in this matter was not started by the defense, unlike Darden, but by the state. Whether it was in "guilt" or "penalty" is a totally artificial distinction in this case.

(ii) That the effect on sentencing test in Darden is distinguishable also because of Florida's judge-sentencing law, in which the jury's opinion is merely advisory. Arkansas does not have judicial override. The jury was the sentencer; Darden's sentencer, a judge, can be presumed to have not been swayed by improper argument in a way that cannot be true in Hayes' instance.

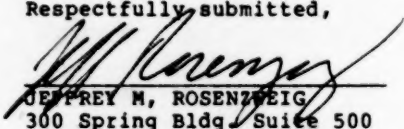
From a policy standpoint, this is also an inappropriate case for a grant of certiorari. The Eighth Circuit's opinion does not bar resentencing. The State of Arkansas is free to proceed against Hayes to resentence him if it desires.

Caldwell v. Mississippi, 472 U.S. 320 (1985) bans misleading argument that deflects the jury from the proper consideration of the issues. It should not be too much of a burden upon the State of Arkansas to see that Hayes is sentenced by a jury not misled by improper argument.

CONCLUSION

Hayes respectfully prays that the Lockhart's Petition for Writ of Certiorari be denied, but that Hayes' Cross-Petition for Writ of Certiorari be granted, that the matter set for argument and the holding of the Court of Appeals reversed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing to the Hon. Jack Gillean, Assistant Attorney General, Tower Building, 4th and Center Streets, Little Rock, Ark. 72201 this 20 day of December, 1989.


JEFFREY M. ROSENZWEIG